83-879

No.



IN THE

# Supreme Court of the United States

October Term, 1983

DR. EDWARD P. GRACE,

*Petitioner,*

v.

UNITED STATES PUBLIC HEALTH SERVICE
and DR. UMBERT HART,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine enunciated in Feres v. United States bars prosecution of a claim brought under the Federal Tort Claims Act by a doctor in the United States Public Health Service on account of a constitutional tort committed against him by his supervisor and by the United States Public Health Service.

2. Whether the doctrine of Feres v. United States, as amplified by Chappell v. Wallace, is applicable to preclude prosecution of a claim brought under the general federal question jurisdiction of the federal courts, and the Fifth Amendment to the United States Constitution, for a constitutional tort commited against a doctor in the United States Public Health Service by his supervisor and by the United States Public Health Service.

3. Whether a claim predicated upon violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, seeking an award of damages, including compensatory damages and punitive damages, as well as injunctive relief, can only be heard in the United States District Court and not by the United States Claims Court.

## PARTIES BELOW

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The Petitioner, Dr. Edward P. Grace, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered on July 13, 1983, as confirmed by the denial of the petition

for rehearing of Petitioner entered on August 30, 1983.

## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit, per curiam, and the United States District Court for the District of Maryland, per District Judge Norman P. Ramsey, appear in the Appendix. Each opinion was unreported.

## JURISDICTION

The judgment of the United States Court of Appeals was decided and entered on July 13, 1983. Subsequently, a timely petition for rehearing was filed by Petitioner, but was denied by the Court of Appeals on August 30, 1983. This Petition for Writ of Certiorari has been filed

within ninety days of the denial of the petition for rehearing, as required by 28 U.S.C. §2101(c) and Rule 20.4 of the Rules of the Supreme Court of the United States.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1331(a):

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. §1346(a) and (b):

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding

in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

> office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1491:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this Paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the

United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the

provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

## STATEMENT OF THE CASE

Petitioner, Dr. Edward P. Grace, invoked the jurisdiction of the federal courts to complain of the wrongful termination of his participation in the surgical residency training program of the United States Public Health Service Corps. As to counts one, two and three of the amended complaint, his suit was brought under the general federal question jurisdiction of the district court, 28 U.S.C. §1331(a), and the Fifth Amendment to the United States Constitution. As to count four, the suit was based upon the Federal Tort Claims Act, 28 U.S.C. §§2671

to 2680 and the provisions of 28 U.S.C. §1346(b).

Petitioner alleged that Respondent, Dr. Umbert Hart, then Deputy Chief of Surgery at the U. S. Public Health Service Hospital in Baltimore, and the agency, Respondent, United States Public Health Service, acted in derogation of his rights under the Fifth Amendment to the United States Constitution by prematurely terminating his surgical residency in the fourth year, in June 1979, immediately prior to the time when he would have become Chief Resident. Petitioner averred that the conduct of Dr. Hart was intentional, and was motivated by personal hatred and discriminatory animus against Petitioner, as well as by a desire to retaliate against Petitioner for having challenged Respondent

Dr. Hart's professional competence. As to Respondent, United States Public Health Service, Petitioner contended that the termination of his residency was accomplished in violation of his rights to procedural and substantive due process of law.

No factual testimony, or documentary evidence, was offered in the proceedings before the United States District Court for the District of Maryland. Rather, the case was decided upon Respondents' initial motion for judgment on the pleadings, and then Respondents' renewed motion to dismiss. District Judge Ramsey granted the motion to dismiss as to counts two, three and four of Petitioner's amended complaint, and transferred count one to the United States

Claims Court under the provisions of 28 U.S.C. §1346(a)(2) and §1406(c).

On appeal, the United States Court of Appeals for the Fourth Circuit held that the lower court was correct in ruling that Petitioner had no viable cause of action against his superior officer, Dr. Umbert Hart, nor against the United States Public Health Service, based upon this Court's decision in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), as explicated by its recent decision in Chappell v. Wallace, ____ U.S. _____, 103 S.Ct. 2362 (1983), and based upon this Court's decision in Bush v. Lucas, _____ U.S. _____, 103 S.Ct. 2404 (1983). The Court of Appeals further held, because of a misapprehension of Petitioner's contentions, that he had not

sought money damages for Respondents' alleged breach of contract and therefore that a portion of the case had been erroneously transferred to the United States Claims Court. The Court of Appeals refused to reconsider its ruling in response to Petitioner's request for rehearing.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Rule 17.1(c) of Rules of the Supreme Court of the United States.

Citing this Court's recent decision in Chappell v. Wallace, ____ U.S. _____, 103 S.Ct. 2362 (1983), the

Court of Appeals stated without embellishment or explanation that "[t]he district court was correct in ruling that plaintiff has no cause of action against his superior officer, Dr. Umbert Hart." In so doing, the Fourth Circuit Court of Appeals summarily ruled that a judicial doctrine of intra-military immunity from suit, first announced in Feres v. United States, supra, should apply to disputes arising in the context of professional medical relationships in the United States Public Health Service. The Fourth Circuit panel gave no indication that it had considered the important public policy considerations underlying the immunity doctrine in deciding to apply it to disputes between members of the United

States Public Health Service, notwithstanding the clear mandate for employment of such a weighing process set forth in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

Furthermore, this Court has never determined whether the doctrine enunciated in Feres v. United States, supra, banning invocation of the beneficial provisions of the Federal Tort Claims Act by military personnel on active duty, is correctly applicable to professional personnel in the United States Public Health Service. Nor has this Court decided whether the further explanation of the Feres doctrine contained in Chappell v. Wallace, supra, which precludes civil damage suits by enlisted military personnel against their superior

officers for violations of their constitutional rights, applies with similar effect to personnel in the United States Public Health Service.

The reasoning underlying this Court's holdings in Stencel Aero Engineering Corp. v. United States, supra, and Chappell v. Wallace, supra, argues persuasively against the application of the Feres doctrine in the circumstances here presented, as discussed below. The significant questions of federal law raised by the lower courts' rulings deserve to be addressed and answered by this Court.

## ARGUMENT

### I. THE DOCTRINE ENUNCIATED IN FERES v. UNITED STATES IS INAPPLICABLE TO A CLAIM BROUGHT UNDER THE FEDERAL TORT CLAIMS ACT BY A DOCTOR IN THE UNITED STATES PUBLIC HEALTH SERVICE ON ACCOUNT OF A CONSTITUTIONAL TORT COMMITTED AGAINST HIM BY HIS SUPERVISOR AND BY THE AGENCY.

In count four of the amended complaint, Petitioner alleged a claim against Respondents, Dr. Umbert Hart and the United States Public Health Service, under the provisions of the Federal Tort Claims Act, 28 U.S.C. §§2671 to 2680, and the jurisdictional authority of 28 U.S.C. §1346(b). The analogous state law claim is the tort of abusive discharge, recently recognized in Maryland. Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981). According to the reasoning adopted by the District Court and endorsed by the Court of Appeals, that claim is barred by what is conventionally known as the Feres doctrine.

By judicial gloss upon the provisions of the Federal Tort Claims Act, this Court in Feres v. United States,

supra, excepted military personnel on active duty in the armed forces of the United States from the ambit of the Federal Tort Claims Act. The factors which this Court has identified as justifying the application of Feres weigh against its being applied in the instant case, however.

In its pronouncement in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), this Court cited three distinct policy reasons for the rule that injured service personnel cannot recover under the Federal Tort Claims Act. For one, the Court said that the relationship between the Government and members of the armed forces was "distinctly federal in character," demanding a uniform body of

federal law rather than the diversity of controlling law possible under the Federal Tort Claims Act. Second, the Veterans' Benefits Act ordinarily was available as an adequate substitute for the imposition of tort liability upon the United States. Third, consideration of the imperative need for discipline among the ranks of the military, referred to in United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954) as the "peculiar and special relationship of the soldier to his superiors," demanded that civil litigation between them be disallowed.

None of these considerations is present to any significant degree in Petitioner's service as a medical officer in the United States Public Health Service Corps. While technically enjoying the

status of a commissioned officer, Petitioner was first and foremost a physician serving in a hospital, not different in his essential status from the position occupied by a civilian doctor in the same facility. United States v. Brown, supra.

Addressing each of the factors identified in Stencel Aero Engineering Corp. v. United States, supra, the first is inapposite to Petitioner's claim construed as a constitutional tort. The theory of a constitutional tort is founded exclusively upon federal constitutional precepts. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Second, there is no possibility of Petitioner's obtaining recovery under the

Veterans' Benefits Act, or any other compensation scheme, for the wrongs of which he complains. Third, the supposed need for military discipline is almost irrelevant in the context of Petitioner's service as a physician. Alvarez v. Wilson, 431 F. Supp. 136, 145-146 (N.D. Ill. 1977).

More recently, in Chappell v. Wallace, supra, this Court held that enlisted military personnel could not maintain a suit to recover damages from a superior officer for alleged constitutional violations. The Court nevertheless was careful to restrict the scope of its decision, and not to absolutely preclude a so-called Bivens suit by military personnel. It stated that "[t]his Court has never held, nor do we now hold, that

military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." (103 S.Ct. at 2367).

The twin underpinnings of the Court's decision were the recognized need for discipline in the active military service and deference to congressional authority in the specialized area of military justice. As the Court explained:

> The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. Burns v. Wilson, supra, 346 U.S., at 140, 73 S.Ct., at 1047-1048. The special nature of military life, the need for unhesitating and decisive

action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in Feres, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court," Stencel Aero Engineering Corp. v. United States, supra, 431 U.S., at 676, 97 S.Ct., at 2060 (MARSHALL, J., dissenting), quoting United States v. Brown, supra, 348 U.S., at 112, 75 S.Ct., at 143.

Also, Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly

> inconsistent with Congress' authority in this field.

(103 S.Ct. at 2367).

Neither consideration has controlling force in the circumstances of the instant case. For the reasons already expressed, the paramount concern over military discipline which underlies Feres has no relevance to professional personnel in the United States Public Health Service Corps. Alvarez v. Wilson, supra, 431 F.Supp. at 145-146. Nor is there any indication of a congressional intent to preclude the rather narrow and specialized ranks of the members of the United States Public Health Service Corps from access to the usual remedies available in the civilian courts.

As first expounded by this Court, the Feres doctrine is limited to a claim for personal injuries brought under the Federal Tort Claims Act. As extended by the decision in Chappell v. Wallace, supra, it reaches only a claim for damages for a constitutional tort suffered by enlisted military personnel at the hands of their superior officers. Neither rationale precludes maintenance of the suit brought by Petitioner.

II. THE DOCTRINE OF FERES v. UNITED STATES, AS AMPLIFIED BY CHAPPELL V. WALLACE, IS INAPPLICABLE TO PRECLUDE PROSECUTION OF A CLAIM BROUGHT UNDER THE GENERAL FEDERAL QUESTION JURISDICTION OF THE FEDERAL COURTS, AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, FOR A CONSTITUTIONAL TORT COMMITTED AGAINST A DOCTOR IN THE UNITED STATES PUBLIC HEALTH SERVICE BY HIS SUPERVISOR AND BY THE AGENCY.

A. The Feres doctrine does not bar Petitioner's suit against the United States Public Health Service, and his supervisior, Dr. Umbert Hart, under Counts Two and Three of the Amended Complaint which allege the commission of a constitutional tort.

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, this Court recognized the existence of a damage remedy against individual federal officers for "constitutional torts" - violations of a person's constitutional rights by federal officers acting under color of law. The Bivens case allowed the plaintiff to pursue a damage remedy based upon an unconstitutional search and seizure made by federal narcotics agents. This Court reaffirmed the Bivens rationale in Davis v. Passman, 442 U.S. 229, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), where the Court held that the plaintiff had a direct

cause of action for damages based upon violation of her rights under the Due Process Clause of the Fifth Amendment. The grant of general federal question jurisdiction under 28 U.S.C. §1331 afforded the means of entry into the federal system.

This Court once again affirmed the principles announced in Bivens in Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). Plaintiff there claimed violations of due process, equal protection and Eighth Amendment rights, and asserted federal court jurisdiction under 28 U.S.C. §1331(a). The Court held that the plaintiff did have a cause of action for a constitutional tort under Bivens, notwithstanding the fact that the claim also may have been brought under the Federal Tort Claims Act. The Court's

holding was predicated upon an analysis of congressional intent in enacting the Federal Tort Claims Act.

> [W]hen Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U.S.C. §2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action:
>
> > '[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in Bivens] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the Bivens case and its progenty (sic), in that it waives the defense of sovereign

> immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved).' S.Rep.No. 93-588, p. 3 (1973) (emphasis supplied).
>
> In the absence of a contrary expression from Congress §2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights.

Carlson v. Green, supra, 100 S.Ct. at 1472.

To the extent that the dismissal of Petitioner's claims was predicated upon the view that Petitioner could not bring a

separate action for a contituional tort, basing jurisdiction on 28 U.S.C. §1331(a) and not the Federal Tort Claims Act, the ruling was contrary to this Court's holding in Carlson v. Green, supra. As the Court concluded, "[p]lainly FTCA is not a sufficient protector of the citizen's constitutional rights, and without a clear congresional mandate we cannot hold that Congress relegated [plaintiff] exclusively to the FTCA remedy." Carlson v. Green, supra, 100 S.Ct. at 1474. The Court cited four factors distinguishing a Bivens remedy from an FTCA action: the deterent purpose, the award of punitive damages, the jury trial option, and the necessity for the liability of federal officers for violations of citizens' constitutional rights to be governed by uniform rules and

not by the vagaries of the laws of the several states. Id. at 1473-1474. All of these factors apply with equal force in the case presently before the Court.

Furthermore, the lower courts erred in applying the Feres absolute immunity doctrine to a separate constitutional tort claim brought not under the Federal Tort Claims Act, but instead under 28 U.S.C. §1331(a) and the Fifth Amendment. "[T]he question of who may enforce a statutory right [such as those claims brought under the FTCA] is fundamentally different than the question of who may enforce a right that is protected by the Constitution." Davis v. Passman, supra, 99 S.Ct. at 2274 (emphasis in original). Compelling policy distinctions require that the judicially created

Feres exception to the statutory causes of action under the Federal Tort Claims Act not be applied to the constitutional cause of action alleged here, except where dictated by the "special factors" recognized in Chappell v. Wallace, supra.

Analysis of the decision in Chappell v. Wallace, supra, shows that the factors which persuaded this Court that the Feres doctrine was applicable to bar a suit for a constitutional tort by enlisted military personnel are not present here. The "special factors counselling hesitation", Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, 403 U.S. at 396, as perceived by the Court, focused upon the requirements of military discipline.

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military oganization can function without strict discipline and regulation that would be unacceptable in a civilian setting. See Parker v. Levy, supra, 417 U.S., at 743-744, 94 S.Ct., at 2555-2556; Orloff v. Willoughby, 345 U.S. 83, 94, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953). In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life." Schlesinger v. Councilman, 420 U.S. 738, 757, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591 (1975). The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The

Court has often noted "the peculiar and special relationship of the soldier to his superiors," United States v. Brown, supra, 348 U.S., at 112, 75 S.Ct., at 143; see In re Grimley, 137 U.S. 147, 153, 11 S.Ct. 54, 55, 34 L.Ed. 636 (1890), and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty...." Burns v. Wilson, 346 U.S. 137, 140, 73 S.Ct. 1045, 1048, 97 L.Ed. 1508 (1953) (plurality opinion). This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military

> personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

103 S.Ct. at 2365.

The "special factors" found in Chappell v. Wallace, supra, to warrant rejection of a Bivens remedy have no valid application to physicians serving in the United States Public Health Service Corp. There is no need for strict discipline and obedience to orders; in fact, medical science functions best when constructive questioning of medical viewpoints and opinions is encouraged. The commissioned officers of the United States Public Health Service are not involved in "training that precedes combat," where conduct in combat will reflect the training previously received; Petitioner's "training" was only

to fight disease. Indeed, it is only "[i]n time of war, or of emergency involving the national defense proclaimed by the President" that this commissioned corps of the Service even becomes a military service. 42 U.S.C. §217. Until such time, the medical professionals serving in the United States Public Health Service are not subject to the Uniform Code of Military Justice, and they do not partake of a relationship that is "at the heart of the necessarily unique structure of the military establishment."

The other mainstay of the decision in Chappell v. Wallace, supra, was the view that Congress essentially had pre-empted the field of military justice.

> Congress has exercised its plenary constitutional authority over the military, has enacted statutes

> regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents. Military personnel, for example, may avail themselves of the procedures and remedies created by Congress in Article 138 of the Uniform Code of Military Justice, 10 U.S.C. §938.

(103 S.Ct. at 2366).

No such comprehensive internal system of justice regulates the commissioned officers of the United States Public Health Service, and the procedures and remedies of the Uniform Code of Military Justice ordinarily are not available to them. 42 U.S.C. §217.

The policy considerations which

are at the foundation of the Court's holding in Chappell v. Wallace, supra, clearly are not pertinent to medical officers in the United States Public Health Service. Nevertheless, the Fourth Circuit Court of Appeals, without undertaking an analysis of whether these "special factors" were existent, blindly applied the Feres rule to preclude Petitioner's constitutional tort claim. Whether the Feres doctrine, as extended by Chappell, is applicable to a claim for a constitutional violation brought by a member of the United States Public Health Service is a substantial and important question of federal law which should be settled by this Court.

B. Respondent, United States Public Health Service, does not enjoy sovereign immunity from suit under Count

Two of the Amended Complaint which is premised upon the commission of an intentional constitutional tort.

The District Court and the Court of Appeals ruled that Petitioner had no cause of action against the United States Public Health Service for general compensatory damages, based upon application of the doctrine of sovereign immunity. While Petitioner recognizes the time-tested strength of the doctrine, Honda v. Clark, 386 U.S. 484, 501, 87 S.Ct. 1188, 18 L.Ed.2d 244 (1967); United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941), Petitioner submits that it cannot be utilized as a shield behind which governmental agencies may hide to escape responsibility for the intentional violation of citizens' constitutional rights. As to

consititutional torts, any immunity enjoyed by a governmetal entity or official can only be qualified, and susceptible to being lost upon the allegation and proof of intentional conduct motivated by malice.

C. Respondent, Dr. Umbert Hart, does not enjoy immunity from suit under Count Three of the Amended Complaint which alleges that Respondent acted in his individual capacity to deprive Petitioner of his constitutional rights.

Assuming the inapplicability of the Feres rationale to insulate Respondent, Dr. Umbert Hart, from suit, he enjoys no other immunity from legal resonsibility for his actions. The overwhelming weight of the precedent cases establishes that individual liability may be fastened upon a governmental official who exceeds the bounds of his authority and/or who takes action within the scope of his official duties in violation of another's

constitutional rights for reasons stemming from malice and ill will. Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); Tigue v. Swaim, 585 F.2d 909 (8 Cir. 1978); Alvarez v. Wilson, supra.

III. A CLAIM PREDICATED UPON VIOLATIONS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SEEKING AN AWARD OF DAMAGES, INCLUDING COMPENSATORY DAMAGES AND PUNITIVE DAMAGES, AS WELL AS INJUNCTIVE RELIEF, CAN ONLY BE HEARD IN THE UNITED STATES DISTRICT COURT AND NOT BY THE UNITED STATES CLAIMS COURT.

Indisputably, the United States Claims Court lacks jurisdiction over claims sounding in tort. Somali Development Bank v. United States, 508 F.2d 817, 820-821 (Ct.Cl. 1974); Transcountry Packing Co., Inc. v. United States, 568 F.2d 1333, 1336 (Ct.Cl. 1978); Radioptics, Inc. v. United States, 621 F.2d 1113, 1130 (Ct.Cl. 1980);

Berdick v. United States, 612 F.2d 533, 536 (Ct.Cl. 1979); Schillinger v. United States, 155 U.S. 163, 15 S.Ct. 85, 39 L.Ed. 108 (1894). In count one of the amended complaint, Petitioner alleged an intentional deprivation of his constitutional rights by Respondent, United States Public Health Service, amounting to what has been termed a constitutional tort. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra; Davis v. Passman, supra; Carlson v. Green, supra. Such a claim can only be prosecuted in the federal district court, and not before the United States Claims Court. Schillinger v. United States, supra. Among other things, there is no provision in the Claims Court for the award of punitive damages, or for a jury trial, which are important aspects of the remedy afforded a

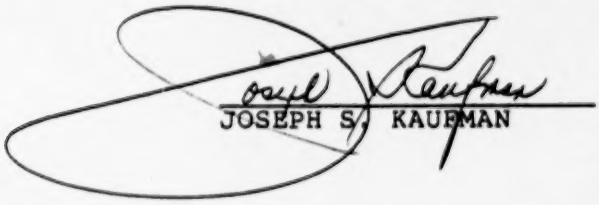
plaintiff in a Bivens suit. Carlson v. Green, supra. Moreover, the Claims Court lacks authority to grant Petitioner an effective injunctive remedy. Berdick v. United States, supra, 612 F.2d at 536; United States v. Jones, 131 U.S. 1, 9 S.Ct. 669, 33 L.Ed. 90 (1889).

If the Feres doctrine is held applicable to preclude prosecution of Petitioner's claim, construed as a constitutional tort, then he lacks any effective remedy. On the other hand, if Feres is inapplicable, as Petitioner steadfastly maintains, then the correct forum for the adjudication of Petitioner's rights is the District Court.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,



JOSEPH S. KAUFMAN

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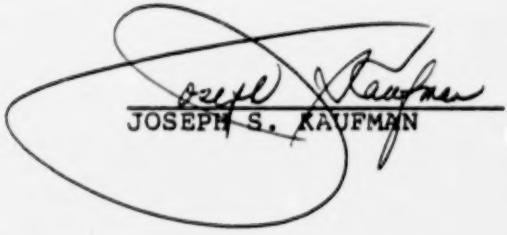
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 1983, three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed, first-class postage prepaid, to J. Frederick Motz, Esquire, United States Attorney for the District of Maryland, and to Elizabeth H. Trimble, Esquire, Assistant United States Attorney, United States Court House, 101 West Lombard Street, Baltimore, Maryland 21201, counsel for Respondents.



JOSEPH S. KAUFMAN

## APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 82-1388

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Dr. Edward P. Grace,

Appellant,

v.

United States Public Health Service
and
Dr. Umbart Hart, etc.,

Appellees.

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Appeal from the United States
District Court for the District of
Maryland, at Baltimore.
Norman P. Ramsey, District Judge.

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Argued March 7, 1983
Decided July 13, 1983

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Before WINTER, Chief Judge, ERVIN,
Circuit Judge, and ALDRICH,* Senior
Circuit Judge.

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Ransom J. Davis (Melnicove, Kaufman,
Weiner & Smouse, P.A. on brief) for

Appellant; Elizabeth H. Trimble, Assistant United States Attorney (J. Frederick Motz, United States Attorney on brief) for Appellee.

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* Hon. Bailey Aldrich, Senior United States Circuit Judge for the First Circuit, sitting by designation.

PER CURIAM:

Plaintiff, a commissioned officer in the United States Public Health Service Corps, sued his superior officer and the Service complaining that his participation in the surgical residency program was wrongfully terminated. From a judgment adverse to his complaint, he appeals. We stayed decision in his case until the Supreme Court decided Wallace v. Chappell, _____ U.S. _____ (1983) and Bush v. Lucas, _____ U.S. ____ (1983). Both cases are now decided and we proceed to decision. We affirm in part and reverse in part.

The district court was correct in ruling that Plaintiff has no cause of action against his superior officer, Dr. Umbart Hart. Chappell, supra. It was also correct in its ruling that plaintiff has no cause of action for damages against the United States Public Health Service, where, as here, plaintiff has not been deprived of any compensation and administratively he was offered reassignment to another surgical residency program. Bush, supra. While plaintiff may have a cause of action against the Service for reinstatement in the original surgical residency program, that claim as pleaded appeared to be incidental to the claim for money damages. If plaintiff asserts a cause of action for money damages founded upon a theory of alleged breach of contract, he must pursue

it in the United States Claims Court. Cook v. Arentzen, 582 F.2d 870 (4 Cir. 1978). Since it appeared that plaintiff proceeded under that theory, the district court correctly transferred the contract claim to the United States Claims Court.

Before us, however, plaintiff expressly disavows that he asserts any cause of action for breach of contract, and by law, he has no claim for money damages. We think therefore that the portion of the district court's judgment transferring plaintiff's cause of action to the United States Claims Court must be reversed, and plaintiff remitted to the district court to pursue his claim for equitable relief.

AFFIRMED IN PART;
REVERSED IN PART.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1388

Dr. Edward P. Grace,

Appellant,

v.

United States Public Health Service
and
Dr. Umbart Hart, etc.,

Appellees.

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O R D E R

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Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Ervin and Judge Aldrich (First Circuit).

For the Court,

/s/ William K. Slate, II

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| DR. EDWARD P. GRACE | * | |
| Plaintiff | * | |
| v. | * | CIVIL ACTION |
| UNITED STATES PUBLIC HEALTH SERVICE | * | NO. R-81-1633 |
| DR. UMBERT HART, U.S. Public Health Service Hospital | * | |

* * * * * * * * *

MEMORANDUM AND ORDER

Currently before the Court is defendants' motion to dismiss the amended complaint. The issues raised by this motion have been fully briefed and the subject of oral argument on two separate occasions. For the reasons detailed below, defendants' motion is granted.

On July 1, 1978, plaintiff, a medical doctor, began a two year contract as a commissioned officer in the United States Public Health Service Corps. At that time he anticipated that this term would encompass his fourth and fifth year surgical residencies. Plaintiff alleges that defendant, United States Public Health Service ("Service"), and in particular defendant Hart, instigated a process which resulted in the unjustified, premature termination of his surgical residency and caused him to be subjected to an involuntary termination proceeding which sought to discharge him prior to the normal expiration of his contract. Plaintiff's complaint alleges four causes of action, each of which defendants have moved to dismiss or in the alternative to transfer to the Court of Claims.

In Count IV, plaintiff asserts a claim against defendants under the Federal Tort Claims Act, specifically 28 U.S.C. §2672, for the tortious conduct of defendant Hart, in instigating the wrongful termination of the surgical residency of plaintiff in violation of the tort of abusive discharge under the law of Maryland, the place of the alleged wrong. Defendants argue, and the Court agrees, that plaintiff's claims in Count IV are barred by the immunity doctrine of Feres v. United States, 340 U.S. 135 (1950).

In Feres the Supreme Court recognized a common law exception to the FTCA's waiver of sovereign immunity and held that the United States "is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of

activity incident to service." Id. at 146. The Feres doctrine was reaffirmed by the Supreme Court in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

As a commissioned officer in the United States Public Health Service Corps, the Court finds that plaintiff at the time of his alleged injuries, was within the scope of the Feres doctrine. At least two courts have applied the Feres doctrine to claims instituted by physicians in the United States Public Health Service. See Alexander v. United States, 500 F.2d 1 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); Levin v. United States, 403 F.Supp. 99 (D. Mass. 1975). In Levin, the district court, in granting defendants' motion to dismiss, noted: "There is no reasonable

way, 'in law or in logic, to distinguish the position of the P.H.S. [Public Health Service] officer from that of the military man, for purposes of tort suits." 403 F.Supp. at 103. Furthermore, in Sigler v. LeVan, 485 F. Supp. 185, 191 (D. Md. 1980), the Honorable Edward S. Northrop noted that "[t]he courts that have considered the question are apparently unanimous in their conclusion that Feres applies even when the tort-feasor is not a member of the military but is a nonmilitary, governmental employee." See, e.g., Upteqrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); Jaffee v. United States, 468

F.Supp. 632 (D.N.J. 1979), aff'd, 633 F.2d 1226 (3d Cir. 1981). Although the injury complained of in the current case is economic, as opposed to physical, in nature, plaintiff can take no refuge in this distinction as it is the plaintiff who has sought to style Count IV as a cause of action under the FTCA. Therefore, assuming, without deciding, that the law of Maryland provides the necessary foundation for plaintiff's claim under the FTCA, see Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981), defendants' motion to dismiss Count IV pursuant to the Feres doctrine will be granted.

In Count II, plaintiff attempts to state a cause of action against defendant Hart and the Service based on defendant Hart's alleged personal hatred and

discriminatory animus against plaintiff and the Service's ratification of those acts. As to defendant Service, it is clear that Cournt II must be dismissed. As a suit against an agency of the United States, the suit is in effect against the sovereign. The doctrine of sovereign immunity bars actions against the United States except for cases where it consents to be sued. Honda v. Clark, 386 U.S. 484, 501 (1967); United States v. Sherwood, 312 U.S. 584, 586 (1941). Moreover, section 1331 of the judiciary code implies no general waiver of sovereign immunity. A. L. Rowan & Son, General Contractors, Inc. v. Department of Housing & Urban Development, 611 F.2d 997, 1000 (5th Cir. 1980). Unlike Count IV, plaintiff asserts no waiver of sovereign immunity as to the Service in Count II.

Pursuant to Fed.R.Civ.P. 8(a) and 12(b), Count II as to defendant Service will be dismissed.

In Counts II and III, plaintiff seeks to sue defendant Hart in his individual capacity for his actions motivated by personal hatred and discriminatory animus against plaintiff. Presumably, plaintiff is attempting to invoke the Court's jurisdiction over these counts by alleging an intentional deprivation of constitutional rights amounting to a constitutional tort, or Bivens-type action. Assuming that the claims against defendant Hart contained in Counts II and III can be so construed, they are nonetheless barred by the Feres doctrine. "'[C]ourts have . . . uniformly recognized that the Feres bar extends to

both constitutional and intentional torts in noncombat situations." Sigler v. LeVan, supra, 485 F.Supp. at 191 (quoting Thornwell v. United States, 471 F. Supp. 344, 348 (D.D.C. 1979)). Because state tort claims are easily susceptible to restatement as constitutional claims, the Feres immunity doctrine could be easily abrogated by "artful pleading," Judge Northrop warned in LeVan, if its rationale were not applied to constitutional claims. 485 F.Supp. at 192. Counts II and III of plaintiff's complaint illustrate precisely the type of artful pleading anticipated by Judge Northrop. Furthermore, the fact that defendant Hart is being sued in his individual capacity does not require a different result. As the Court noted in LeVan, the Feres bar extends to defendants

acting in their individual, as well as their official capacities. Id.

In Count I, plaintiff alleges that defendants violated his substantive and procedural rights under the due process clause of the Fifth Amendment, by the way in which his fourth year surgical residency was terminated. Defendants argue that although cloaked in terms of a constitutional cause of action, Count I is in essence a contract claim for monetary relief in excess of $10,000, and therefore within the exclusive jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. §1346 (a)(2).

The determination of whether a case falls within the exclusive jurisdiction of the Court of Claims or the more general jurisdiction of the district

courts depends upon the proper construction given to a cause of action. Wingate v. Harris, 501 F.Supp. 58, 61 (S.D.N.Y. 1980). If Count I states a cause of action arising directly under the Constitution, as plaintiff maintains, the Court of Claims has no jurisdiction since the due process and equal protection guarantees of the Fifth Amendment do not obligate the federal government to pay money damages. Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980); Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967). If, however, plaintiff's claim is more properly construed as sounding in contract, his exclusive remedy is to be found in the Court of Claims since he seeks compensatory damages in the amount of $5,000,000.

At the hearing held in this matter, counsel for plaintiff conceded that Count I is susceptible to construction as a claim within the exclusive jurisdiction of the Court of Claims. A similar situation was presented in Metadure Corp. v. United States, 490 F. Supp. 1368 (S.D.N.Y. 1980) wherein the plaintiff sought injunctive and monetary relief for an alleged deprivation of property in violation of the due process clause of the Fifth Amendment. In rejecting this attempt to avoid litigating its claim in the Court of Claims, the District Court for the Southern District of New York noted that the plaintiff "may not, by the simple expedient of lumping its contract claims together and denominating them a constitutional violation, escape the procedural limitation of the Tucker Act."

Id. at 1373. Moreover, in Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978), where a female officer in the Naval Reserve brought an action seeking reinstatement, back pay, and damages on the theory that her involuntary separation from the regular Navy under pregnancy regulations was unconstitutional, the Court of Appeals for the Fourth Circuit held that jurisdiction properly was in the Court of Claims, not the District Court.

Where a district court is without jurisdiction to entertain a claim, a motion to dismiss normally will be granted. The Fourth Circuit has indicated, however, that rather than dismiss, a §1346(a)(2) claim, the claim should be transferred to the Court of Claims. Cook v. Arentzen, supra. Pursuant to 28 U.S.C. §1406(c), therefore,

Count I of the plaintiff's complaint will be transferred to the Court of Claims.

The Court recognizes that where less than all claims in an action are within the exclusive jurisdiction of the Court of Claims, there is some dispute as to whether the entire suit must be transferred to the Court of Claims. In Grasso v. United States Postal Service, 438 F. Supp. 1231 (D. Conn. 1977), for example, the plaintiff brought suit against the Post Office and alleged two counts sounding in contract and two counts sounding in tort. In Grasso, the Court transferred the plaintiff's "non-tort" claims to the Court of Claims. As to plaintiff's tort claims, however, the District Court retained jurisdiction "because of [its] exclusive jurisdiction

over tort claims against the United States." Id. at 1236 n.5. Similarly, in other circumstances, courts have held that the Court of Claims' exclusive jurisdiction over monetary damages exceeding $10,000 does not deprive a federal district court of jurisdiction over all equitable claims asserted in a complaint. See, e.g., Giordano v. Roudebush, 617 F.2d 511, 514 (8th Cir. 1980); Neal v. Secretary of the Navy, 472 F.Supp. 763 (E.D.Pa. 1979); rev'd on other grounds, 639 F.2d 1029 (3d Cir. 1981); Bruzzone v. Hampton, 433 F.Supp. 92 (S.D.N.Y. 1977). The principle that seems to emerge from these cases is that although Congress sought to give the Court of Claims jurisdiction over a government employee's entire claim where feasible, the Tucker Act does not compel a district court

transferring a claim or claims to that forum to transfer the entire case. In the present action, the Court need not rule on the soundness of this approach. Because Counts II, III and IV will be dismissed, the entirety of Plaintiff's case, Count I, is, pursuant to the Fourth Circuit's direction in Cook, being transferred to the Court of Claims.

For the reasons stated herein, it is this 19th day of March, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motion to dismiss as to Counts II, III and IV is GRANTED;

2. That Count I of plaintiff's complaint is transferred to the

Court of Claims pursuant to 28 U.S.C. §§1346(a)(2) and 1406(c); and

3. That the Clerk will mail copies of this Memorandum and Order to all counsel of record.

/s/
Norman P. Ramsey
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| DR. EDWARD P. GRACE | * | |
| Plaintiff | * | |
| v. | * | CIVIL ACTION |
| UNITED STATES PUBLIC HEALTH SERVICE | * | NO. R-81-1633 |
| DR. UMBERT HART, U.S. Public Health Service Hospital | * | |
| Defendants | * | |

* * * * * * * * *

JUDGMENT

In accordance with the Memorandum and Order dated March 19, 1982, and filed in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That defendants' motion to dismiss as to Counts II, III and IV is GRANTED; and

2. That Count I of plaintiff's complaint is transferred to the Court of Claims pursuant to 28 U.S.C. §§1346(a)(2) and 1406(c).

/s/
Norman P. Ramsey,
United States
District Judge

Dated: March 22, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| DR. EDWARD P. GRACE<br>Baltimore, Maryland<br>21209 | * | |
| Plaintiff | * | |
| v. | * | CIVIL ACTION |
| UNITED STATES PUBLIC HEALTH SERVICE<br>Department of Health, Education and Welfare<br>Washington, D.C. | * | NO. R-81-1633 |
| and | * | |
| DR. UMBERT HART<br>U.S. Public Health Service Hospital<br>3100 Wyman Park Drive<br>Baltimore, MD 21211 | * | |
| Defendants | * | |

* * * * * * * *

AMENDED COMPLAINT

Now comes Dr. Edward P. Grace, Plaintiff, by Ransom J. Davis and

Melnicove, Kaufman, Weiner & Smouse, P.A., his attorneys, and sues the United States Public Health Service, Department of Health, Education and Welfare, United States of America and Dr. Umbert Hart, Defendants.

COUNT ONE

Jurisdiction and Parties

1. Jurisdiction exists in this Court to entertain the claim hereinafter alleged under the provisions of 28 U.S.C. §1331(a), and the Fifth Amendment to the United States Constitution.

2. Plaintiff, Dr. Edward P. Grace (hereinafter "Dr. Grace") is a resident of Baltimore, Maryland and a medical doctor trained as a surgeon. Dr. Grace further is a Protestant

Christian from Luxor, Eygpt, but who emigrated to the United States in 1971 and became a naturalized citizen of the United States in 1978.

3. Plaintiff, Dr. Grace, during the period July 1, 1978 through June 30, 1980 was a Commissioned Officer in the United States Public Health Service Corps, with the rank of Lieutenant Commander, assigned to the United States Public Health Service Hospital in Baltimore, Maryland.

4. Defendant, United States Public Health Service, Department of Health Education and Welfare (hereinafter, "U. S. Public Health Service") is an agency and instrumentality of the United States of America, with offices at Washington D.C.

5. Defendant, Dr. Umbert Hart (hereinafter "Dr. Hart") currently is the

Acting Chief of Surgery at the United States Public Health Service Hospital, 3100 Wyman Park Drive, Baltimore, Maryland.

Background Facts

6. Dr. Grace received his doctor of medicine degee from the Medical Faculty of Cairo University in Eygpt in June, 1969. Thereafter, from 1969 to 1970 he served an internship at the Cairo University Hospital. From 1970 to 1971 he served an additional internship at the Lebanon Christian Medical Center before coming to the United States in 1971.

7. In the United States, from July 1, 1973 to June 30, 1974 he completed his first year residency in surgey at Harlan Appalachian Regional Hospital in Harlan, Kentucky. Then, from 1974 to 1975,

Dr. Grace continued his surgical training at Deacon's Hospital in St. Louis, Missouri. Dr. Grace served his second year surgical residency at St. Mary's Hospital in Waterberry, Connecticut and proceeded to his third year residency at Middlesex General Hospital in New Brunswick, New Jersey.

8. In June, 1978, Plaintiff, Dr. Grace, was accepted for In-Service Residency Training in the U.S. Public Health Service, which entitled him to the rank of a Commissioned Officer in the U.S. Public Health Service Corps. Dr. Grace was given a two-year contract, effective from July 1, 1978 to June 30, 1980, which in the usual course of events would have encompassed his fourth and fifth year surgical residencies. Dr. Grace was

assigned to the U.S. Public Health Service Hospital in Baltimore, Maryland where at the start of his term, Dr. Harold E. Ramsey was the Chief of Surgery and Defendant, Dr. Hart, then was Deputy Chief of Surgery.

Summary Allegations

9. Defendant, Dr. Hart, acting in his official capacity and as the agent, servant and/or employee of Defendant, U.S. Public Health Service, instigated a process which resulted in the unjustified, premature termination of Dr. Grace's surgical residency, short of completion of his fifth year when he ordinarily would have been Chief Resident. Dr. Hart's actions directly and proximately prevented Dr. Grace from sitting for his examinations before the American Board of Surgery, and

being accepted as a qualified surgeon. Dr. Hart's actions further caused Dr. Grace to be subjected in November, 1979 to an involuntary termination proceeding which sought to discharge Dr. Grace from the U.S. Public Health Service Corps prior to the normal expiration of his contract. The institution of these court-martial proceedings against him, although ultimately resolved in his favor, irreparably stigmatized Dr. Grace and damaged his career, besides causing him extreme emotional anguish and financial loss.

10. Defendant, U.S. Public Health Service, in the person of Defendant Dr. Hart, and other members of the professional staff of the hospital, including specifically the members of the Training

and Education Committee and the Executive Committee of the Medical Staff, acting as the agents, servants or employees of the U.S. Public Health Service and within the scope of their authority, denied Plaintiff Dr. Grace substantive and procedural due process of law by the termination of his surgical residency in the fourth year, and by the manner in which they accomplished the termination. Plaintiff was denied fundamental rights in the proceedings, including any advance notice of the charges against him, an opportunity to be heard in opposition to the charges, the right to present the testimony of witnesses on his behalf or other pertinent evidence, or to challenge the evidence offered against him, before the decision to terminate his residency was made on June 26, 1979, all in

violation of constitutional protections afforded Plaintiff under the Fifth Amendment to the United States Constitution.

Chronology of Events

11. When Plaintiff Dr. Grace commenced his fourth year surgical residency at the U.S. Public Health Service Hospital in Baltimore, Maryland on July 1, 1978, Dr. Harold E. Ramsey was Chief of Surgey. Plaintiff worked well with Dr. Ramsey and enjoyed a cordial relationship with him. After the controversy instigated by Defendant Dr. Hart erupted, Dr. Ramsey wrote a letter stating that he had found Dr. Grace to be "a competent physician, regarding his medical knowledge and technical skill."

12. Plaintiff initially had a satisfactory relationship with Defendant, Dr. Hart, as well. It appeared that Dr. Hart thought highly of Plaintiff's abilities as a surgeon during this period, as Dr. Hart rated Dr. Grace at "86" in September, 1978 and at "87" in December, 1978, based on a 100 point rating system.

13. Plaintiff's relationship with Dr. Hart began to change after it became apparent to Dr. Grace that Dr. Hart had seriously mishandled several medical procedures. One significant example was the treatment accorded a middle-aged male patient who suffered from a 90% occlusion of the brachiocephalic artery. Dr. Hart performed a caroid to caroid bypass operation on this patient on October 11, 1978, to relieve the effects of the

occlusion. Dr. Grace subsequently learned in 1979, during his rotation through the University of Maryland Hospital, that the surgical technique employed by Dr. Hart was obsolete and was likely to leave the patient in a worse condition than he had been previously. Dr. Grace later verified that, after the surgery, the patient had enjoyed a brief period of seeming improvement and then his condition had markedly deteriorated. A patient who had entered the hospital as a functioning individual departed the facility permanently disabled.

14. In the case of another patient, Plaintiff Dr. Grace had ordered the individual confined to bed because of the danger of post-operative bleeding after elective resection of an abdominal aortic

aneurysm. The danger of such bleeding was heightened because of poor surgical technique used by Dr. Hart during the operation, as observed by Dr. Grace. Later, Dr. Hart visited the patient in the Intensive Care Unit and, despite being apprised by the nurse of Dr. Grace's reasons, countermanded Dr. Grace's orders regarding confinement to bed. The patient subsequently developed severe internal bleeding and died.

15. Plaintiff Dr. Grace was invited to attended the United States Public Health Service's Annual Meeting in Phoenix, Arizona between the dates April 16 to 19, 1979. Initially it was discussed between Dr. Grace and defendant Dr. Hart that Plaintiff would present a paper on Dr. Hart's successful use of the caroid to

caroid bypass to relieve the occlusion in the brachiocephalic artery suffered by the patient mentioned in Paragraph Thirteen (13). When Plaintiff learned of the inappropriate nature of the technique used by Dr. Hart, however, and confirmed the disastrous consequences for the patient, he refused to do so. Thereafter, relations between Dr. Grace and Dr. Hart deteriorated, and Dr. Hart commenced a series of machinations aimed at destroying Dr. Grace's career as a surgeon. At that time Dr. Hart threatened Dr. Grace that, because of Plaintiff's refusal to give the paper at the Annual Meeting, he would never be Chief Resident.

16. On April 1, 1979, after a meeting of the Training and Education Committee of the U.S. Public Health Service

Hospital on March 30, 1979, Plaintiff was placed in a probationary status for two months. The ostensible reasons for the action were poor performance ratings which Dr. Grace had received from Dr. Joseph McLaughlin, Chief of Cardio-Thoracic Surgery at the University of Maryland Hospital where Plaintiff had been for six weeks during January and February, 1979, and reported difficulties in "interpersonal relations with fellow physicians and nursing staff" attributed to Dr. Grace at the U.S. Public Health Service Hospital.

17. In fact, the low performance ratings which Plaintiff had received from Dr. McLaughlin were in part the result of detrimental remarks about Plaintiff made by Dr. Hart. The problems regarding "interpersonal relations" encountered by

Dr. Grace at the U.S. Public Health Service Hospital, while accurate in part, were not of such consequence as to affect his abilities as a surgeon.

18. On May 27, 1979, Plaintiff was involved in an unfortunate incident in which he reportedly lost his temper with a member of the nursing staff. What occurred was that Dr. Grace dismissed a nurse from the bedside of a patient whom Dr. Grace was trying to assist, after she became sullen, discourteous and refused to help him properly. This trivial event was seized upon by Dr. Hart, and made the pretext for the termination of Dr. Grace's surgical residency. The patient himself later supported Dr. Grace, stating in writing that the nurse had behaved badly, but this information was deliberately ignored by Dr. Hart.

19. On June 22, 1979, there was a meeting of the Training and Education Committee of the U.S. Public Health Service Hospital. Citing the incident with the nurse on May 27, 1979, and other reasons embellished by fabrication and distortion of the truth, Dr. Hart recommended to the Committee that it vote to terminate Dr. Grace's training effective June 30, 1979. The Committee accepted Dr. Hart's recommendation, subject only to the concurrence of Dr. Ramsey, who was absent. Dr. Hart had taken advantage of the one day absence of Dr. Ramsey in scheduling the meeting, to facilitate his effort to harm Dr. Grace's career.

20. On June 26, 1979, there was a meeting of the Executive Committee of the Medical Staff, convened to consider the

recommendation previously made by the Training and Education Committee. Again upon the urging of Dr. Hart, and based upon his malicious and false depiction of Dr. Grace as a surgeon of marginal competence who had great difficulties in handling "interpersonal relations," the Committee voted to terminate Dr. Grace's participation in the Surgical Training Program as of June 30, 1979. Dr. Ramsey participated in this meeting, and concurred in the result, but later stated that it did not represent his individual judgment as to Dr. Grace; he assumed that the matter had already been decided in effect at the earlier meeting.

21. By memorandum dated June 26, 1979 from Dr. William D. Lassek, Acting Director of the U.S. Public Health Service

Hospital, received by Dr. Grace on June 27, 1979, Plaintiff was informed of the action of the Executive Committee. To that point, Plaintiff had been given no indication that any such drastic action was contemplated against him. Indeed, he was but three days away from commencing his fifth year surgical residency.

22. On July 2, 1979, a special meeting of the Executive Committee of the Medical Staff was convened to allow Dr. Grace to appear and plead his case as to why his residency should not be terminated. At this point, the Committee's decision had already been made, however, so that the gesture was an empty charade. Not surprisingly, the Committee voted to uphold its previous action. Furthermore, the Committee voted to deny Dr. Grace a

certificate of satisfactory completion of his fourth year residency.

23. On July 3, 1979 Plaintiff was reassigned as a generalist in the Primary Health Services Department of the U.S. Public Health Service Hospital, assigned mainly to the Emergency Room. In addition to being personally humiliating to Dr. Grace, it also placed him in a field of medicine outside his area of specialized training.

24. On September 11, 1979, Dr. Leonard Bachman, Medical Director of the Division of Hospitals and Clinics of the U.S. Public Health Service, recommended that steps be initiated to discharge Dr. Grace from the Commissioned Corps. On October 15, 1979, the further recommendation was made that he be relieved

of any "patient care responsibilities."

25. On October 22, 1979, formal written notice was given to Plaintiff Dr. Grace of commencement of action for his involuntary separation from the U.S. Public Health Service Corps.

26. The hearing was held before the Involuntary Separation Board on November 26, 1979. The charges against Dr. Grace were twofold. First, that he had "disrupted the effective delivery of health care services to the detriment of patient care by behaving in an unprofessional, antagonistic and overbearing manner in front of patients and staff." Second, that he had "failed to demonstrate the basic skills and knowledge required to be a physician." Both charges were found not to have been substantiated by the evidence

presented to the Board.

27. The comments of the Involuntary Separation Board in its written findings were significant. As to the supposed inadequacies in interpersonal relations, the Board said these related "to relatively small incidents of which much was made." The Board also said that there was "inadequate documentation of deficiencies in Dr. Grace's performance prior to April, 1979 which would warrant his being placed on probation." Finally, the Board held unquivocally that there was "no documentation of deficiencies in Dr. Grace's technical proficiency or competence as a surgical resident." The Board recommended that Dr. Grace not be discharged, but instead that he be reassigned to a fourth year level surgical

residency program in another geographical area.

28. By letter dated January 7, 1980, Delbert A. Larson, Director, "Commissioned Personnel Operations Division, U.S. Public Health Service," accepted the findings of the Involuntary Separation Board. However, he also advised Plaintiff Dr. Grace that Plaintiff's commission in the U.S. Public Health Service Corp. nonetheless would be terminated effective June 30, 1980.

29. Plaintiff thereafter filed a grievance with the U.S. Public Health Service seeking reinstatement to his rightful status as Chief Resident at the U.S. Public Health Service Hospital in Baltimore, Maryland, but his grievance was ultimately denied. Plaintiff remained on

inactive status on administrative leave from November, 1979 until June 30, 1980.

30. Since then, Plaintiff Dr. Grace has found alternative employment of a pretigious character, first at New York Medical College, and more recently at Greater Baltimore Medical Center in Baltimore, Maryland. However, to date Plaintiff has been unable to gain admittance into any surgical residency program anywhere in the United States and/or to find an opportunity to complete his fifth year residency at an approved hospital.

Basis of Action

31. Defendants, Dr. Hart and the U.S. Public Health Service, violated Plaintiff's substantive and procedural

rights under the due process clause of the Fifth Amendment to the United States Constitution by the manner and means by which the termination of Dr. Grace's fourth year surgical residency at the U.S. Public Health Service Hospital in Baltimore was accomplished. Defendants furthermore acted arbitrarily and capriciously, without any rational justification based on relevant factors such as Dr. Grace's competency as a surgeon, and instead acted because of extraneous and irrelevant considerations, such as his supposed difficulties with "interpersonal relations", which were mere pretexts.

32. The procedure followed by Defendant U.S. Public Health Service, its agent, servants and/or employees, in terminating Plaintiff Dr. Grace as a fourth

year surgical resident failed to accord him the fundamental requisites of due process of law. Dr. Grace was subjected to the extreme sanction of termination of his residency just three days before he would have become Chief Resident, without any advance notice to him or opportunity to appear and defend himself against the unwarranted allegations leveled by Dr. Hart, and otherwise without even the pretense of fairness. Despite the later finding of the Involuntary Separation Board that the charges against Dr. Grace were not substantiated, and specifically that there was no evidence that Dr. Grace lacked the essential qualifications for continuation in the surgical training program, Defendant U.S. Public Health Service refused to annul the wrongful action previously taken

against him or to reinstate him as Chief Resident at the U.S. Public Health Service Hospital in Baltimore.

Damages

33. As a direct consequence of the wrongful actions of Defendants, Plaintiff Dr. Grace was caused the following injuries and damages: he was caused to be terminated as a participant in the In-Service Residency Training Program of the Public Health Service during his fourth year residency; denied the opportunity of proceeding to his fifth year residency when he would have been Chief Resident; prevented from advancing in an orderly fashion through the essential steps toward his goal of becoming a fully qualified surgeon, and specifically, denied

the right of completing training which was an absolute prerequisite to his examination and certification by the American Board of Surgery; significantly delayed if not irreparably barred from fulfillment of his career ambitions; denied the monetary recompense which would come with his achieving the rank of a Board-certified surgeon; subjected to the degrading experience of a proceeding to terminate his commission as a member of the United States Public Health Service Corps; compelled to bear the expense of obtaining legal counsel to assist in the preparation of his defense before the Involuntary Separation Board; forced to submit to being relieved of any patient care responsibilities at the U.S. Public Health Service Hospital in Baltimore and then allowed to remain on inactive,

administrative leave until the expiration of his contract on June 30, 1980; needlessly embarassed and humiliated, injured in his professional pride and self-esteem, and caused to suffer significant, prolonged mental anguish, emotional pain and suffering, as well as substantial financial losses, now and for the foreseeable future, all as a proximate result of Defendants' malicious and unlawful acts in violation of Plaintiff's constitutionally protected rights.

WHEREFORE, Dr. Edward P. Grace, Plaintiff sues the United States Public Health Service, Defendant, and prays that this Honorable Court grant relief to Plaintiff, as follows:

A). Entry of a mandatory injunction against Defendant, United States

Public Health Service, compelling Defendant to re-admit Plaintiff, Dr. Edward P. Grace, into the In-Service Residency Training Program, as a fifth year surgical resident, or "Chief Resident" at an appropriate facility in the United States;

B). Entry of a permanent injunction against Defendant, United States Public Health Service, enjoining Defendant from taking any action to terminate the participation of Plaintiff, Dr. Edward P. Grace, in the In-Service Residency Training Program, prior to the completion of his fifth year surgical residency, for any arbitrary, capricious, discriminatory or otherwise unlawful reason;

C). Award of general compensatory damages to Plaintiff, Dr. Edward P. Grace, in the amount of Five

Million Dollars ($5,000,000.00), plus punitive damages in the amount of Five Million Dollars ($5,000,000.00), together with the expenses of litigation, including reasonable attorney's fees, plus interest and costs, and

D). Such other and further relief as the nature of the case may require.

COUNT TWO

34. Plaintiff realleges and incorporates herein the allegations of Paragraphs One (1) through Thirty-Three (33) of Count One, except that Plaintiff alleges that at all relevant times Defendant, Dr. Hart, was acting in his individual capacity, and/or outside the scope of his official duties and

responsibilities, and furthermore, that his actions were motivated by personal hatred, discriminatory animus against Dr. Grace, and by a desire to retaliate against Dr. Grace for having confronted him with provable acts of medical malpractice.

35. Plaintiff further alleges that Defendant, United States Public Health Service, nonetheless subsequently ratified, adopted and approved the unlawful and maliciously inspired acts of Defendant, Dr. Hart, and by such action, became liable to Plaintiff for the consequences of Dr. Hart's conduct, including all the injuries and damages sustained by Plaintiff.

WHEREFORE, Dr. Edward P. Grace, Plaintiff, sues the United States Public Service and Dr. Hart, Defendants, and claims the sum of Five Million Dollars

($5,000,000.00) in compensatory damages and additionally, the sum of Five Million Dollars ($5,000,000.00) in punitive damages, together with the expenses of litigation, including reasonable attorney's fees, plus interest and costs.

COUNT THREE

36. Plaintiff realleges and incorporates herein the allegations of Paragraphs One (1) through Thirty-Three (33) of Count One, except that Plaintiff says that at all relevant times Defendant, Dr. Umbert Hart, was acting in his individual capacity, and/or outside the scope of his official duties and responsibilities, and furthermore, that his actions were motivated by personal hatred, discriminatory animus against Dr. Grace,

and by a desire to retaliate against Dr. Grace for having confronted him with provable acts of medical malpractice.

WHEREFORE, Dr. Edward P. Grace, Plaintiff, sues Defendant, Dr. Umbert Hart, and claims the sum of Five Million Dollars ($5,000,000.00) in compensatory damages, and additionally, the sum of Five Million Dollars ($5,000,000.00) in punitive damages, together with the expenses of litigation, including reasonable attorney's fees, plus interest and costs.

COUNT FOUR

37. Plaintiff realleges and incorporates herein the allegations of Paragraphs Two (2) through Thirty-Three (33) of Count One.

38. Jurisdiction exists in this Court to entertain the claim hereinafter alleged under the provisions of 28 U.S.C. §1346 (b) and the Federal Tort Claims Act, 28 U.S.C. §§2671 to 2680.

39. Plaintiff has filed an administrative claim seeking redress for the injuries and damages herein set forth with the Division of Public Health Service Claims, United States Public Health Service, in compliance with the requirements of 28 U.S.C. §2675(a). Furthermore, Defendant has failed to make a final disposition of Plaintiff's claim within six (6) months, entitling Plaintiff to treat the agency's inaction as a final denial under the provisions of the Act, 28 U.S.C. §2675(a).

40. The instant claim is cognizable under the Federal Tort Claims Act, specifically 28 U.S.C. §2672, in that the claim of Plaintiff Dr. Grace is one "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Here, Defendant U.S. Public Health Service is liable for the tortious conduct of its agent, servant and/or employee, Defendant Dr. Hart, in instigating the wrongful termination of the surgical residency of Dr. Grace at the U.S. Public Health Service

Hospital in Baltimore in violation of Plaintiff's constitutional and other legal rights, corresponding to the tort of abusive discharge under Maryland law.

WHEREFORE, Dr. Edward P. Grace, Plaintiff sues the United States Public Health Service and Dr. Umbart Hart, Defendants, and claims the sum of Five Million Dollars ($5,000,000.00) in compensatory damages, and the expenses of litigation, including reasonable attorney's fees, plus interest and costs.

/s/
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Attorney for Plaintiff
Dr. Edward P. Grace

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| DR. EDWARD P. GRACE<br>Baltimore, Maryland<br>21209 | * | |
| Plaintiff | * | |
| v. | * | CIVIL ACTION |
| UNITED STATES PUBLIC HEALTH SERVICE<br>Department of Health, Education and Welfare<br>Washington, D.C. | * | NO. R-81-1633 |
| and | * | |
| DR. UMBERT HART<br>U.S. Public Health Service Hospital<br>3100 Wyman Park Drive<br>Baltimore, MD 21211 | * | |
| Defendants | * | |

* * * * * * * *

DEMAND FOR A JURY TRIAL

PLEASE TAKE NOTICE that the Plaintiff, Dr. Edward P. Grace, demands

trial by jury in the above-captioned civil action.

/s/

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Attorney for Plaintiff,
Dr. Edward P. Grace

No. 83-879

# In the Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD P. GRACE, PETITIONER

*v.*

UNITED STATES PUBLIC HEALTH SERVICE
AND UMBERT HART

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks to recover damages from the government and from his former supervisor in the Public Health Service for a personnel action taken against him while he was a commissioned officer in the Service.

1. Petitioner was a commissioned officer in the Public Health Service, holding the rank of Lieutenant Commander, on a limited, two-year appointment. He was initially assigned to a surgical residency training program. After one year, his participation in that program was terminated and he was reassigned to a different medical program. Pet. App. 7a, 27a. The stated reasons for the reassignment

were petitioner's marginal competence and his inability to get along with others (*id.* at 40a-41a).[1]

According to the allegations contained in the complaint, respondent Hart, who was petitioner's supervisor, initially recommended the reassignment to the Training and Education Committee of the Public Health Service hospital to which petitioner was assigned. That Committee, after considering Dr. Hart's recommendation, also concluded that petitioner should be reassigned, and it forwarded its recommendation to the Executive Committee of the Medical Staff. According to the complaint, the Executive Committee also agreed that petitioner should be reassigned. Petitioner was then invited to appear before the Executive Committee. After hearing him the Committee voted to terminate petitioner's residency, and he was reassigned. Pet. App. 40a-43a.

Another physician who was an official of the Public Health Service subsequently recommended that petitioner be discharged from the Service entirely, but following administrative proceedings the Service determined not to discharge petitioner. He left the Service when his commission expired. Pet. App. 7a, 29a, 43a-46a.

Petitioner brought suit against respondents in the United States District Court for the District of Maryland, seeking a total of $35 million in damages allegedly caused by his reassignment from the surgical residency training program, as well as reinstatement and other equitable relief (see Pet.

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[1]The complaint itself reveals that before his reassignment, petitioner received a poor performance evaluation from a physician who is not a party to this case (Pet. App. 38a); that that physician had also commented on petitioner's inability to get along with his colleagues (*ibid.*); and that petitioner had been involved in what the complaint describes as "an unfortunate incident in which [petitioner] reportedly lost his temper" in dealing with a nurse at a patient's bedside (*id.* at 39a).

App. 50a-52a). He based his claims directly on the Constitution and on the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*

2. The district court transferred one count of petitioner's complaint to the Court of Claims, reasoning that it appeared to present a claim for breach of contract (Pet. App. 17a-21a), but dismissed the remainder of petitioner's claims. The district court ruled that petitioner's FTCA claim was barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that servicemen may not sue the United States under the FTCA for alleged torts incident to military service. The district court reasoned that for purposes of the *Feres* doctrine commissioned officers in the Public Health Service should be treated in the same fashion as members of the Armed Forces. Pet. App. 8a-11a. The district court also ruled that the policies underlying the *Feres* doctrine barred petitioner's constitutional damages action against Dr. Hart, and that the constitutional damages action against the United States was barred by sovereign immunity (*id.* at 11a-16a).

The court of appeals affirmed in an unpublished per curiam opinion (Pet. App. 2a-4a). It held that *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), which was decided after the district court's decision, precluded petitioner's constitutional damages action against respondent Hart because petitioner "ha[d] not been deprived of any compensation and administratively he was offered reassignment to another surgical residency program" (Pet. App. 3a). The court of appeals also ruled (*ibid.*) that petitioner's damages claim against respondent Hart was barred by this Court's intervening decision in *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983). Noting that petitioner had disavowed any claim based on breach of contract, the court of appeals reversed the district court's order insofar as it transferred petitioner's

lawsuit to the Court of Claims and remanded for consideration of petitioner's claim for equitable relief (Pet. App. 3a-4a).

3. Petitioner's amorphous complaint was correctly dismissed for several reasons. Petitioner's constitutional claim appears to be that he was denied procedural due process in connection with his reassignment from the residency program (see Pet. App. 32a, 48a). We note that the adequacy of the process petitioner received is apparent on the face of the complaint.[2] But in addition, petitioner's action against the government based on this alleged constitutional violation is barred by sovereign immunity. It is well settled that the United States cannot be sued for damages arising from constitutional violations in the absence of a waiver of sovereign immunity, and—as petitioner appears to concede (Pet. 39-40)—Congress has enacted no waiver of sovereign immunity applicable to petitioner's constitutional claim. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *Radin* v. *United States*, 699 F.2d 681, 684-685 & n.8 (4th Cir. 1983); *Laswell* v. *Brown*, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *Jaffee* v. *United States*, 592 F.2d 712, 717-718 (3d Cir.), cert. denied, 441 U.S. 961 (1979); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); *Norton* v. *United States*, 581 F.2d 390, 393-394 (4th Cir.), cert. denied, 439 U.S. 1003 (1978); *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976).

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[2]While petitioner's complaint alleges at one point that he was denied notice and an opportunity to be heard (Pet. App. 32a), at another point the complaint recites that petitioner did receive notice (*id.* at 41a-42a) and that he was invited by the Executive Committee "to appear and plead his case as to why his residency should not be terminated" (*id.* at 42a).

Petitioner's constitutional damages claim against Dr. Hart (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra*) was correctly dismissed because, among other reasons, the complaint nowhere alleges that Dr. Hart was responsible for any alleged constitutional violation. The procedural defects alleged by petitioner—denial of "advance notice of the charges against him, an opportunity to be heard in opposition to the charges, the right to present the testimony of witnesses on his behalf or other pertinent evidence, or to challenge the evidence offered against him" (Pet. App. 32a)—are defects in the procedures allegedly followed by the Training and Education Committee and the Executive Committee. As we have noted, the procedures were not in fact deficient in these ways (see page 4 note 2, *supra*). But in any event, Dr. Hart's only role, according to the complaint, was that he made the initial recommendation that petitioner be reassigned from the residency training program. There is no allegation that Dr. Hart designed, operated, ordered into effect, or in any other way assumed responsibility for the allegedly unconstitutional procedures that the Committees used. Cf. *Parratt* v. *Taylor*, 451 U.S. 527 (1981). Especially in light of this Court's requirement that *Bivens* complaints be pleaded with specificity (see, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978)), petitioner's claim was correctly dismissed.[3]

Petitioner also attempts to challenge his reassignment under the FTCA by asserting that Dr. Hart committed the tort of "abusive discharge" (Pet. App. 60a). It is readily apparent that if this approach were to succeed, any adverse

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[3]To be sure, petitioner asserts that Dr. Hart's "actions were motivated by personal hatred, discriminatory animus * * *, and by a desire to retaliate" (Pet. App. 55a; see *id.* at 56a-57a) and were arbitrary and capricious (*id.* at 48a). But those allegations do not state a constitutional violation.

personnel action taken by the government could be challenged under the FTCA. It has never been thought that the FTCA can be used as a vehicle for routine challenges to adverse personnel actions (see *Bush* v. *Lucas*, slip op. 18-21), and Congress could not possibly have intended that it would be used in this fashion. The tort of abusive or wrongful discharge falls within the exceptions from the FTCA for claims "arising out of * * * interference with contract rights" (28 U.S.C. 2680(h)) and claims "based upon the exercise or performance * * * [of] a discretionary function" (28 U.S.C. 2680(a)).

Finally, we note that every lower court that has considered the issue has agreed with the courts below that the Public Health Service so closely resembles the Armed Forces that under the *Feres* doctrine, commissioned officers of the Public Health Service may not sue the government for torts allegedly committed incident to their employment. See *Alexander* v. *United States*, 500 F.2d 1, 3-4 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); *Hamilton* v. *United States*, 564 F. Supp. 1146, 1148-1150 (D. Mass. 1983); *Levin* v. *United States*, 403 F. Supp. 99 (D. Mass. 1975). These attributes of the Public Health Service are sufficient to bar not only an FTCA action against the United States but petitioner's *Bivens* action against Dr. Hart as well. Compare *Feres* with *Chappell* v. *Wallace*, *supra*.[4]

The *Feres* doctrine and the rule of *Chappell* v. *Wallace* are based on the "peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance

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[4]In addition, petitioner could have sought relief from the Board for the Correction of Public Health Service Records, which, like boards for the correction of military records, has authority to amend any record in order to "correct an error or remove an injustice" (10 U.S.C. 1552, incorporated by reference in 42 U.S.C. (Supp. V) 213a(a)(12)). The decisions of this Board are subject to judicial review. In *Chappell*, the Court viewed the existence of such a remedy as a factor that counselled against the creation of *Bivens* remedy (see slip op. 7).

of such suits on discipline" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954), quoted in part in *Chappell*, slip op. 4; see also *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977)). The statutes Congress has enacted to regulate the Public Health Service reveal that Congress believes that "the relevant conditions of service in the Public Health Service are very similar to those in the armed forces and demonstrate the equally special relationship and need for discipline" (*Alexander* v. *United States*, 500 F.2d at 4). For example, the Public Health Service is defined as one of the nation's "uniformed services," as are the Army, Navy, Air Force, and Marine Corps (42 U.S.C. 201(p)). Commissioned officers in the Service are assigned ranks that have military counterparts (42 U.S.C. 207). Congress has incorporated by reference, in the statutes governing the Service, many of the provisions that govern the benefits and privileges of members of the Armed Forces (see 42 U.S.C. (& Supp. V) 213 and 213a). And in wartime the President can prescribe that the Public Health Service "shall constitute a branch of the land and naval forces of the United States" and that its members shall be subject to the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* (42 U.S.C. 217).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

FEBRUARY 1984

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[5]Petitioner even refers to the administrative proceedings that the Health Service instituted against him as a "court-martial" (Pet. App. 31a).